Supreme Court, U.S.
FILED
JUL 22 2002
OFFICE OF THE CLERK

No. 01-1695

In the Supreme Court of the United States

MARIA HSIA, AKA HSIA LING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

ELIZABETH D. COLLERY
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a prosecution for causing political committees to submit materially false statements to the Federal Election Commission, in violation of 18 U.S.C. 1001 and 18 U.S.C. 2(b), requires proof that the defendant knew that her conduct was unlawful.

2. Whether the court of appeals erred in failing to review a jury instruction that defendant did not challenge in the district court or in her opening brief on appeal.

3. Whether conduct that violates provisions of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, must be prosecuted under FECA's criminal enforcement provisions, or may be prosecuted under general federal criminal provisions in Title 18 of the United States Code.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	9
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Bryan v. *United States*, 524 U.S. 184 (1998)	11
Cheek v. *United States*, 498 U.S. 192 (1991)	10
Clipper Exxpress v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982), cert. denied, 459 U.S. 1227-1228 (1983)	23
Dowling v. *United States*, 473 U.S. 207 (1985)	21, 22
Edwards v. *United States*, 312 U.S. 473 (1941)	20
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)	23
McBride v. *Merrell Dow & Pharm., Inc.*, 800 F.2d 1208 (D.C. Cir. 1986)	16
Morton v. *Mancari*, 417 U.S. 535 (1974)	17
NLRB v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967)	21
NLRB v. *Drivers Local Union*, 362 U.S. 274 (1960)	21
National Collegiate Athletic Ass'n v. *Smith*, 525 U.S. 459 (1999)	16
New York Times v. *Sullivan*, 376 U.S. 254 (1964)	23
Pipefitters Local Union No. 562 v. *United States*, 407 U.S. 385 (1972)	21
Randall v. *Loftsgaarden*, 478 U.S. 647 (1986)	17, 18
Ratzlaf v. *United States*, 510 U.S. 135 (1994)	6, 9-10, 11
TVA v. *Hill*, 437 U.S. 153 (1978)	17
United States National Bank of Oregon v. *Independent Insurance Agents of America, Inc.*, 508 U.S. 439 (1993)	16

Cases—Continued: Page

United States v. *Armstrong*, 909 F.2d 1238 (9th Cir.), cert. denied, 498 U.S. 870 (1990) 12
United States v. *Bakhtiari*, 913 F.2d 1053 (2d Cir. 1990), cert. denied, 499 U.S. 924 (1991) 10
United States v. *Barker*, 930 F.2d 1408 23
United States v. *Batchelder*, 442 U.S. 114 (1979) 17
United States v. *Beacon Brass Co.*, 344 U.S. 43 (1952) 18
United States v. *Bilzerian*, 926 F.2d 1285 (2d Cir.), cert. denied, 502 U.S. 813 (1991) 21
United States v. *Boffa*, 688 F.2d 919 (3d Cir. 1982) 21
United States v. *Borden Co.*, 308 U.S. 188 (1939) 17
United States v. *Brien*, 617 F.2d 299 (1st Cir.), cert. denied, 446 U.S. 919 (1980) 21
United States v. *Cook*, 586 F.2d 572 (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979) 12
United States v. *Curran*, 20 F.3d 560 (1994) 6, 10, 12, 17, 22
United States v. *Daly*, 756 F.2d 1076 (5th Cir.), cert. denied, 474 U.S. 1022 (1985) 23
United States v. *Daughtry*, 48 F.3d 829 (4th Cir.), vacated on other grounds, 516 U.S. 984 (1995) 10, 11, 14
United States v. *DeLaurentis*, 491 F.2d 208 (2d Cir. 1974) 21
United States v. *Enmons*, 410 U.S. 396 (1973) 21
United States v. *Gabriel*, 125 F.3d 89 (2d Cir. 1997) 12, 13
United States v. *Hansen*, 772 F.2d 940 (D.C. Cir. 1985), cert. denied, 475 U.S. 1045 (1986) 21
United States v. *Hopkins*, 916 F.2d 207 (5th Cir. 1990) 10, 22
United States v. *Hsia*, 176 F.3d 517 (D.C. Cir. 1999) 8

Cases—Continued: Page

United States v. *Jackson*, 805 F.2d 457 (2d Cir. 1986), cert. denied, 480 U.S. 922 (1987) 21
United States v. *Johnson*, 390 U.S. 563 (1968) 21
United States v. *Leal*, 30 F.3d 577 (5th Cir. 1994), cert. denied, 513 U.S. 1182 (1995) 10
United States v. *Lovasco*, 431 U.S. 783 (1977) 16
United States v. *Michaels*, 796 F.2d 1112 (9th Cir. 1986), cert. denied, 479 U.S. 1038 (1987) 12
United States v. *Mitchell*, 39 F.3d 465 (4th Cir. 1994), cert. denied, 515 U.S. 1142 (1995) 20-21
United States v. *Moore*, 423 U.S. 122 (1975) 20
United States v. *Noveck*, 273 U.S. 202 (1927) 20
United States v. *Oakar*, 111 F.3d 146 (D.C. Cir. 1997) 10
United States v. *Parsons*, 967 F.2d 452 (10th Cir. 1992) 21
United States v. *Rodriguez-Rios*, 14 F.3d 1040 (5th Cir. 1994) 11
United States v. *Steinhilber*, 484 F.2d 386 (8th Cir. 1973) 10
United States v. *Tomeny*, 144 F.3d 749 (11th Cir. 1998) 20
United States v. *West Indies Transport, Inc.*, 127 F.3d 299 (3d Cir. 1997), cert. denied, 522 U.S. 1052 (1998) 12
United States v. *Williams*, 504 U.S. 36 (1992) 16

Constitution, statutes and regulations:

U.S. Const. Amend. I 22-23
Act of Mar. 27, 2002, Pub. L. No. 107-55, § 315(b), 116 Stat. 108 ..... 3, 18
Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* 2
2 U.S.C. 431(13) 3
2 U.S.C. 434(b)(3)(A) 3
2 U.S.C. 437c(b) 3

Statutes and regulations: Page

2 U.S.C. 437g(d) 19
2 U.S.C. 437g(d)(1)(A) 3
2 U.S.C. 441a(a)(1)(A) 2
2 U.S.C. 441a(a)(3) 2
2 U.S.C. 441b 2
2 U.S.C. 441f 3
18 U.S.C. 2 ..... 6, 11, 19
18 U.S.C. 2(b) 2, 5, 7, 9, 11, 12, 13, 14
18 U.S.C. 371 4
18 U.S.C. 545 21
18 U.S.C. 924(a)(1)(D) 11
18 U.S.C. 1001 ..... *passim*
26 U.S.C. 501(c)(3) 4

In the Supreme Court of the United States

No. 01-1695

MARIA HSIA, AKA HSIA LING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 3a-6a) affirming petitioner's convictions is not reported. A prior opinion of the court of appeals reversing the district court's dismissal of the false statement counts of the indictment (Pet. App. 7a-24a) is reported at 176 F.3d 517. This Court's denial of certiorari to review that decision is noted at 528 U.S. 1136. The district court's opinion dismissing the indictment's false statement counts (Pet. App. 25a-87a) is reported at 24 F. Supp.2d 33.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on December 11, 2001. A petition for rehearing was denied on February 15, 2002 (Pet. App. 161a-162a). The petition for a writ of certiorari was filed on May 15, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury in the District of Columbia indicted petitioner on, *inter alia*, five counts of causing political committees to submit materially false statements to the Federal Election Commission (FEC), in violation of 18 U.S.C. 1001 and 18 U.S.C. 2(b). The district court dismissed the false statement counts, Pet. App. 25a-87a, and the court of appeals reversed. *Id.* at 7a-24a. Following a jury trial, petitioner was convicted on all five false statement counts. She was sentenced to three years' probation, with the first 90 days in home detention, plus 250 hours of community service, and a total fine of $5000. Gov't C.A. Br. 2. The court of appeals affirmed. Pet. App. 1a-6a.

1. a. The Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, imposes limits on contributions to candidates for federal office. Individuals may contribute no more than $1000 to any candidate with respect to any election, and may contribute no more than $25,000 to political committees in any calendar year. 2 U.S.C. 441a(a)(1)(A), 441a(a)(3). Corporations are prohibited altogether from making contributions in connection with federal elections. 2 U.S.C. 441b. To ensure that the Act's contribution limitations are not easily evaded, FECA provides that "[n]o person shall make a contribution in the name of another person or knowingly permit his name to be

used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another." 2 U.S.C. 441f. Further, the Act requires political committees to keep detailed records of their financial activities and to file periodic reports with the FEC disclosing, *inter alia*, the name, mailing address, occupation, and employer of each "person (other than a political committee) who makes a contribution" to the committee and whose aggregate annual contributions exceed $200. 2 U.S.C. 431(13), 434(b)(3)(A). See Pet. App. 26a-27a; Gov't C.A. Br. 3-4.

The FEC administers FECA and has exclusive jurisdiction over civil enforcement. 2 U.S.C. 437c(b). As recently amended, the Act provides criminal penalties for "knowing[] and willful[]" violations of the conduit contribution ban, up to a maximum of five years' imprisonment. See Act of Mar. 27, 2002, Pub. L. No. 107-155, § 315(b), 116 Stat. 108 (providing for five years' imprisonment for offenses involving $25,000 or more in a calendar year and two years' imprisonment for offenses involving more than $10,000 and less than $25,000). At the time of the events at issue here, however, the maximum sentence of imprisonment for a knowing and willful violation of the Act was one year. 2 U.S.C. 437g(d)(1)(A).

b. Petitioner, an immigration consultant in the Los Angeles area, acted as a fundraiser for local, state, and federal election campaigns. Gov't C.A. Br. 3-5. As a result of her fundraising activities, petitioner was familiar with federal contribution limits, and knew that donor cards had to be filled out when a federal election contribution was made, that the names of contributors must be reported to the FEC, and that contributions

could not be made in the name of another. Gov't C.A. Br. 5-7.

One of petitioner's immigration clients was the International Buddhist Progress Society (IBPS), which operates the Hsi Lai Temple in Hacienda Heights, California. The IBPS is a tax-exempt religious organization incorporated in California and prohibited from participating in political campaigns under 26 U.S.C. 501(c)(3). Beginning in the spring of 1995, petitioner used straw contributors to funnel money from the IBPS and other improper sources to various political committees. Petitioner either would find and solicit individuals to serve as nominal contributors or ask others (including IBPS) to do so. Some of the conduits were nuns, monks, and volunteers from IBPS, while others were friends and associates of petitioner. In one instance, petitioner herself acted as a straw contributor. The nominal contributors were reimbursed in full by the actual contributors, including IBPS. Petitioner did not disclose to the political committees that received the contributions that they had been made through conduits. Accordingly, the political committees reported the names of the straw contributors to the FEC. Gov't C.A. Br. 4-17.

An indictment issued by a federal grand jury in the District of Columbia charged petitioner with, *inter alia*, five counts of causing false statements, in violation of 18 U.S.C. 1001 and 18 U.S.C. 2(b).[1] The indictment alleged that petitioner willfully caused the political committees that were the recipients of conduit contributions to

---

[1] The indictment also alleged that petitioner conspired to defraud the FEC and the INS, in violation of 18 U.S.C. 371. That count was dismissed on the government's motion before trial. Gov't C.A. Br. 2.

submit materially false statements to the FEC. The reports filed were false because the political committees listed the conduit contributions as being from their nominal sources, although the true sources were IBPS and petitioner's immigration clients. Pet. App. 10a; Gov't C.A. Br. 1-3.

2. The district court dismissed the indictment's false statement counts on a variety of theories. Pet. App. 65a-87a. Among other things, the court noted that, in its view, showing that petitioner acted knowingly and willfully under Sections 1001 and 2(b) in causing a false statement to be made would require proof that she knew that her conduct was illegal—*i.e.*, that she "knew of the [political party] treasurers' reporting obligation, that [she] attempted to frustrate those obligations [*sic*], and that [she] knew [her] conduct was unlawful," Pet. App. 84a n.32. The court stated that "[i]t is difficult, if not impossible * * * to imagine how the government possibly could prove" those facts in this case. *Ibid.* Although the district court dismissed the false statement counts, it rejected petitioner's contention that the indictment must be brought under the FECA or not at all, concluding that the FECA did not impliedly repeal the more general provisions of the federal criminal code. Pet. App. 29a-44a.

3. The court of appeals reversed and reinstated the false statement charges. Pet. App. 7a-24a. With respect to the issues presented in the petition for certiorari, the court of appeals held that the government was not required to prove that petitioner knew her conduct was unlawful. The court reasoned that because petitioner was charged with causing a false statement offense, the government could show the necessary mens rea "simply by proof (1) that [petitioner] knew that the statements to be made were false (the mens rea for the

underlying offense—§ 1001) and (2) that [petitioner] intentionally caused such statements to be made by another (the additional means rea for § 2(b))." *Id.* at 11a-12a. While acknowledging that the Third Circuit had reached a contrary result in *United States* v. *Curran*, 20 F.3d 560 (1994), the court concluded that the *Curran* decision relied on an overly broad reading of this Court's opinion in *Ratzlaf* v. *United States*, 510 U.S. 135 (1994). Pet. App. 12a. The court accordingly held that "nothing in the indictment's allegations contradicts the government's capacity to prove the statutorily required mens rea." *Ibid.*

In addition, relying on the settled presumption against repeal by implication, the court of appeals agreed with the district court that FECA did not impliedly repeal Sections 1001 and 2, insofar as those provisions prohibited an individual from causing false statements to be made by political committees. Pet. App. 18a-20a. The court explained that it "will not find repeal [by implication] absent 'clear and manifest' evidence that it was intended." *Id.* at 19a. The court concluded that "[petitioner] presents no evidence of this sort." *Ibid.*

4. At trial, petitioner attempted to establish, through cross-examination of the government's witnesses, that certain FEC regulations were complex or confusing and were not necessarily understood by community activists or fundraisers. Supp. Gov't C.A. Br. 3-5. Anticipating this defense, the government requested that the jury be instructed as follows:

> **Falsity and Knowledge of Falsity** . . . . . In this case, the Government asserts that the defendant knew that she would be causing false or fictitious statements to be made because in each instance

> charged in the Indictment she knew who the actual source of the political contributions was, and also knew that the names of the different conduits would be reported as being the actual contributors. It is not necessary for the Government to prove that the defendant knew of the specific reporting requirements of the FEC, or that she knew conduit contributions were specifically prohibited, to establish that the defendant knew the names of the different conduits would be reported as being the actual contributors, but you may take into consideration any knowledge you find the defendant did have concerning FEC reporting requirements and prohibitions in deciding whether she did in fact know that the names of the different conduits would be reported as being the actual contributors.

Supp. Gov't C.A. Br. 6. Other than submitting a generic instruction on false statements, petitioner made no specific objection to the government's proposed language. Petitioner's proposed instructions contained no reference to any specific knowledge that she had to have regarding FEC reporting procedures. *Id.* at 7.

The district court's instructions on the elements of causing a false statement to be made under 18 U.S.C. 1001 and 18 U.S.C. 2(b) included the following language:

> The first two elements are that a political committee treasurer must have made a false statement or representation to the FEC and that the defendant must have known that the statement or representation was false.
>
> The Government is not required in this regard to prove that the defendant knew of the specific reporting requirements or prohibitions of the FEC

> or that she knew whether conduit contributions were specifically prohibited. But the Government must prove beyond a reasonable doubt that she knowingly and willfully caused false statements to be made.

Supp. Gov. C.A. Br. 1-2. Petitioner did not object to this instruction.

5. On appeal, petitioner's opening brief challenged certain aspects of the district court's jury instructions, but it made no mention of the jury instruction that stated that the government did not have to prove that she knew of the specific reporting requirements or prohibitions of the FEC. Pet. C.A. Br. 42-44. Petitioner first mentioned that instruction in a footnote to her reply brief. Pet. C.A. Reply Br. 12 n.15. After the appellate panel suggested at oral argument that this instruction might be inconsistent with its holding on the interlocutory appeal, Pet. App. 141a-153a, the parties filed supplemental briefs addressing that concern.

The court of appeals affirmed in an unpublished *per curiam* memorandum. Pet. App. 3a-6a. With respect to the jury instruction issue addressed in the supplemental briefs, the court found that "[b]ecause [petitioner] did not argue in her opening brief that the district court's instructions to the jury failed to conform with *Hsia I*, 176 F.3d at 522, insofar as the jury was instructed that it did not have to find that Hsia was aware of a reporting requirement, we do not reach that issue." Pet. App. 4a; see *ibid.* ("[b]ecause [petitioner] did not properly raise on appeal claims about jury instructions on the required finding of her knowledge of reporting requirements, this court cannot disturb the jury's finding that [her] causation of false reports being filed was willful.").

ARGUMENT

Petitioner contends that there is a conflict in the circuits that warrants further review of the court of appeals' holding that the government need not prove that petitioner knew that her acts were unlawful in order to convict her on the false statement counts. Review of that narrow legal issue is not justified because the practical difference between the approaches adopted by the courts is relatively small and because the Third Circuit may choose to reconsider its approach in light of decisions from two other circuits critiquing its approach. Petitioner's related challenge to the district court's jury instructions does not merit certiorari review because it was neither pressed nor passed upon below.

Petitioner also argues that the false statement counts must be dismissed, because, in her view the FECA is the exclusive means of enforcing compliance with the federal election laws. The decision of the court of appeals rejecting petitioner's contention is correct, and it does not conflict with any decision of any other court of appeals. Further review of that question is therefore unwarranted.

1. The court of appeals in this case held that, in a "conduit contribution" campaign finance case brought pursuant to Sections 1001 and 2(b), the government must prove that the defendant intentionally caused statements to be made that she knew to be false, but that the government need not prove that the defendant knew that her conduct was illegal. Petitioner contends (Pet. 15-19) that proof of knowledge of illegality is required. Petitioner claims that the court of appeals' ruling conflicts with this Court's decision in *Ratzlaf* v.

United States, 510 U.S. 135 (1994), and that of the Third Circuit in *United States* v. *Curran*, 20 F.3d 560 (1994).

a. The false statement statute, 18 U.S.C. 1001, requires proof that the defendant "knowingly and willfully" made a materially false statement, and that the statement was made in a matter within federal agency jurisdiction. *United States* v. *Leal*, 30 F.3d 577, 584 (5th Cir. 1994), cert. denied, 513 U.S. 1182 (1995). The term "knowingly" requires the government to prove that the defendant was aware the statement was false when she made it. *United States* v. *Steinhilber*, 484 F.2d 386, 389-390 (8th Cir. 1973); see *United States* v. *Bakhtiari*, 913 F.2d 1053, 1059-1061 (2d Cir. 1990) (citing cases), cert. denied, 499 U.S. 924 (1991); *United States* v. *Oakar*, 111 F.3d 146, 158 (D.C. Cir. 1997) (Williams, J., concurring in part and dissenting in part). The term "willfully" in Section 1001 has been consistently interpreted to mean that the defendant acted "deliberately" in conveying false information to another, but it too does not require proof that the defendant knew that making the statement was illegal. See, *e.g.*, *United States* v. *Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990). See also *Cheek* v. *United States*, 498 U.S. 192, 209 (1991) (Scalia, J., concurring) (noting the general rule that "willfully" "refers to consciousness of the act but not to consciousness that the act is unlawful"). Indeed, "defining the term 'willfully' [in a Section 1001 prosecution] to require a knowing violation of the law would circumvent the holding of *United States* v. *Yermian*, 468 U.S. 63, 68-76 (1984), that actual knowledge of federal agency jurisdiction is not required to prove a violation of § 1001." *United States* v. *Daughtry*, 48 F.3d 829, 831 (4th Cir.), vacated on other grounds, 516 U.S. 984 (1995).

This Court's decision in *Ratzlaf* does not support petitioner's contention that Section 1001 requires proof that petitioner knew her conduct was illegal. *Ratzlaf* involved the statutory prohibition against structuring currency transactions "for the purpose of evading" certain reporting requirements. The Court held that the criminal prohibition against "willfully violat[ing]" the anti-structuring provision required proof that the defendant knew that the structuring was unlawful. See 510 U.S. at 138, 149. The Court in *Ratzlaf* relied significantly on the consideration that the underlying provision required a "purpose of evading" the structuring law, so that "willfully" would be superfluous if read to require only deliberate action; the Court did not establish a *per se* rule that a conviction for "willful" acts requires proof that the defendant understood the illegality of his conduct. To the contrary, the Court recognized that the term "[w]illful" is a "word of many meanings," and "its construction [is] often . . . influenced by its context." *Id.* at 141. The *Ratzlaf* Court explicitly reaffirmed the "venerable principle" that ignorance of the law is not a defense. *Id.* at 149. See also *Bryan* v. *United States*, 524 U.S. 184, 193-196 (1998) (declining to apply *Ratzlaf*'s definition of "willfully" to 18 U.S.C. 924(a)(1)(D)). Following *Ratzlaf*, the courts of appeals have continued to hold that the term "willfully" in Section 1001 means deliberate action, not knowledge that the conduct pursued is unlawful. *Daughtry*, 48 F.3d at 831-832; *United States* v. *Rodriguez-Rios*, 14 F.3d 1040, 1048 n. 21 (5th Cir. 1994) (en banc).

The fact that petitioner was charged under Section 2(b), which contains its own "willful[ness]" requirement, does not alter the result. Section 2 does not itself define a substantive offense, but rather "'describes the

kinds of individuals who can be held responsible for a crime.'" *United States* v. *Armstrong*, 909 F.2d 1238, 1243 (9th Cir.) (citation omitted), cert. denied, 498 U.S. 870 (1990). Under Section 2(b), an individual who causes an intermediary to commit a crime is culpable himself, so long as he possesses the intent to commit the underlying offense. *United States* v. *Gabriel*, 125 F.3d 89, 98 (2d Cir. 1997); *United States* v. *Michaels*, 796 F.2d 1112, 1117-1118 (9th Cir. 1986), cert. denied, 479 U.S. 1038 (1987). Accordingly, "an indictment [under Section 2(b)] is sufficient if it alleges the criminal intent required for the substantive offense." *United States* v. *Cook*, 586 F.2d 572, 575 (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979). Thus, as the court of appeals properly held, the requirement in Section 2(b) that the defendant "willfully cause[d]" an offense means only that the defendant intended to bring about the act constituting the crime, see, *e.g.*, *United States* v. *West Indies Transport, Inc.*, 127 F.3d 299, 307 (3d Cir. 1997), cert. denied, 522 U.S. 1052 (1998), not that he must know that his conduct is unlawful, see, *e.g.*, *United States* v. *Michaels*, 796 F.2d at 1117-1118.

b. Petitioner correctly notes (Pet. 15-16) that the Third Circuit has held that, when the government proceeds under Sections 2(b) and 1001 in a federal election law prosecution, "[t]he intent element differs from that needed when the prosecution proceeds directly under section 1001." *United States* v. *Curran*, 20 F.3d at 567. According to the Third Circuit, "a proper charge for willfulness in cases brought under sections 2(b) and 1001 in the federal election law context requires the prosecution to prove that defendant knew of the treasurers' reporting obligations, that he attempted to frustrate those obligations, *and that he knew his conduct was unlawful*." *Id.* at 569 (emphasis

added). The *Curran* court relied on what it perceived to be similarities between the currency reporting laws at issue in *Ratzlaff* and the federal election statutes. *Ibid.* The court did not explain how its view that Sections 1001 and 2(b) require proof of knowledge of illegality in the federal election law context can be squared with settled interpretations of both statutes, which establish that neither requires proof of knowledge of illegality in other contexts. See *United States* v. *Gabriel*, 125 F.3d at 101-102 (rejecting *Curran* and holding that "the considerations that led the *Ratzlaf* Court to interpret 'willfully' to require a knowing violation of the law under section 5322 are of little aid in interpreting section 2(b).").

The disagreement between the District of Columbia Circuit and the Third Circuit does not warrant further review because the difference in practice between the positions of the two courts on this issue is not necessarily great. In a conduit contribution case brought under Sections 1001 and 2(b), both courts require the government to prove that the defendant caused, and intended to cause, a political committee to make a statement (that the named individual is the contributor) that the defendant knew to be false (in that the individual named as the contributor is not the true source of the funds). In order to prove the defendant's knowledge that that statement is false, the government ordinarily will have to show that the defendant knew that the political committee's listing of a particular person as the contributor means that that person was "the true source of the money," rather than "the person in whose name money is given." Pet. App. 16a. Thus, although the court of appeals in this case held that the government need not prove that the defendant knew that making that kind of false statement is illegal, in

cases like this the government will ordinarily show that the defendant had some knowledge of the law in order to show the defendant's knowledge of falsity. That "preclude[s] the possibility that criminal penalties [will be] imposed on the basis of innocent conduct." *United States* v. *Daughtry*, 48 F.3d at 832. In practice, the result may be similar to the proof required in the Third Circuit under *Curran*.[2]

In addition, the Third Circuit has not had an opportunity to revisit *Curran* since it was decided eight years ago. In light of the Second Circuit and D.C. Circuit decisions expressly disagreeing with *Curran*'s reasoning, it is possible that the Third Circuit might choose to overrule *Curran* if the issue were to arise again. Accordingly, certiorari review is not required to review the narrow circuit split over the application of 18 U.S.C. 2(b) and 18 U.S.C. 1001 to campaign finance violations.

2. Petitioner contends (Pet. 20-21) that this Court should grant review to determine whether the district court erred in instructing the jury that the government was not required to prove that the defendant knew of the specific reporting requirements or prohibitions of

---

[2] Petitioner raised the same claim in her petition for certiorari review of the D.C. Circuit's interlocutory decision. In response, the government noted that "[t]he question presented in this case can * * * best be considered in a more concrete factual setting and with the benefit of the precise jury instructions that were given." 99-680 United States Br. in Opp. at 12. Although the trial record now supplies a "more concrete factual setting," petitioner's belated contention that the district court's jury instructions do not accord with the District of Columbia Circuit's interlocutory decision (Pet. 14 & nn. 14 & 15) continues to make this case a poor vehicle for considering any conflict between the Third and District of Columbia Circuits.

the FEC. As the government explained in its supplemental appellate brief, the instruction to which petitioner objects was not erroneous when considered in the context of the jury instructions as a whole and the facts of this case. In particular, the government never contended—and the instruction in context would not have been understood to state—that the defendant could be found guilty of causing the false statements absent proof that she knew that federal election contributions were reported to the FEC.[3] Indeed, the government introduced substantial proof of that knowledge at trial. Likewise, the court's instruction would not have been understood to relieve the jury of finding that the defendant had a general knowledge of the federal election reporting scheme. It simply made clear, in response to petitioner's claims about the complexity of the election laws, that she did not need to know of "the specific reporting requirements or prohibitions of the FEC," Pet. App. 100a, including the specific provision prohibiting conduit contributions. See Supp. Gov't C.A. Br. 2-3. The fact that petitioner did not object to the instruction when it was given suggests that that is precisely how it was understood by those present.

In any event, the court of appeals declined to consider petitioner's objection because it was not properly

---

[3] Petitioner states that "[n]owhere in the court's instructions were the jurors told that Petitioner had to know that statements would be made *or* that they would be false." Pet. 14. The jury was specifically instructed, however, that to "sustain its burden of proof," the government had to prove "beyond a reasonable doubt" that "a political committee treasurer made a false statement or representation to the Federal Election Commission," that "[petitioner] knew that the statement or representation was false," and that "[petitioner] caused the false statement or representation to be made." Pet. App. 98a.

raised in either the district court or the court of appeals. Pet. App. 4a; see Pet. Reply to Gov't Supp. C.A. Br. 9 (Petitioner acknowledges that "[t]he objection to the jury instruction at issue was not properly preserved below."). This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation omitted); see *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Surely the court of appeals' determination, in its unpublished opinion, not to address petitioner's belated claim does not conflict with any decision of any other court, bind the court of appeals in future cases to any particular view regarding the propriety of the instruction, or otherwise present a legal issue that warrants further review.

Petitioner contends (Pet. 15 & n.16) that the court of appeals should have considered her claim under the plain error standard. Courts of appeals, however, are not required to conduct plain error review of claims raised for the first time in a reply brief. Absent exceptional circumstances, appellate courts "generally will not entertain arguments omitted from an appellant's opening brief and raised initially in his reply brief." See *McBride* v. *Merrell Dow & Pharm. Inc.*, 800 F.2d 1208, 1210 (D.C. Cir. 1986). While the court of appeals has discretion to reach such claims in exceptional circumstances, see *United States National Bank of Oregon* v. *Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 447-448 (1993), the question of whether it properly declined to exercise that discretion here does not warrant further review.

3. Petitioner argues (Pet. 22-27) that FECA is the exclusive means of enforcing compliance with its reporting provisions and thus repeals *pro tanto* the more general criminal provisions of the false statements statute, 18 U.S.C. 1001. Both courts below, consistent with every court of appeals that has addressed the issue (including the Third Circuit in *Curran*, see 20 F.3d at 565-566), correctly held that FECA does not repeal by implication the more general provisions of the false statements statute. Further review is therefore unwarranted.

a. It is a "cardinal principle of [statutory] construction that repeals by implication are not favored." *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939); *Randall* v. *Loftsgaarden*, 478 U.S. 647, 661 (1986); *TVA* v. *Hill*, 437 U.S. 153, 189-190 (1978); *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). As the Court has explained, "[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible." *United States* v. *Borden Co.*, 308 U.S. at 198. A legislative intent to repeal must be "clear and manifest," and it is not enough to show that a subsequent statute "cover[s] some or even all of the cases provided for by [the prior act]," *ibid.*, or that "the two statutes produce differing results when applied to the same factual situation," *United States* v. *Batchelder*, 442 U.S. 114, 122 (1979). That principle fully applies when conduct violates more than one criminal statute. Absent an "intent to repeal * * * manifest in the 'positive repugnancy'" between two overlapping criminal statutes, decisions as to "[w]hether to prosecute and what charge to file or bring before a grand jury * * * generally rest in the prosecutor's discretion." *Id.* at 122, 124 (overlapping gun provisions). See

United States v. *Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952).[4]

This case does not justify the invocation of either of the two exceptions to the rule severely disfavoring implied repeals—where there is "irreconcilable conflict" between the two statutes or where "the later act covers the whole situation of the earlier one and is clearly intended as a substitute." *Randall* v. *Loftsgaarden*, 478 U.S. at 661. There is no "conflict" or "positive repugnancy" between the FECA and the false statements statute: FECA imposes limits on contributions to candidates for federal office and requires political committees to keep records of their financial activities and file periodic reports with the FEC disclosing the identity of persons making contributions to the committee. The false statement statute at the time relevant to this case, see Pet. App. 10a n.2, proscribed the willful making of any materially false statement "in any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. 1001. Both statutes define distinct criminal offenses and, by refraining from committing both offenses, individuals may easily comply with both statutes. In addition, since the recent amendment, both statutes carry the same maximum sentence of five years' imprisonment. Pub. L. No. 107-155, § 315(b), 116 Stat. 108 (March 27, 2002) (increasing penalty to five years' imprisonment

---

[4] Petitioner's attack (Pet. 8-10, 24) on the evolution of the Department of Justice's approach to prosecution of election campaign violations, as reflected in successive editions of the Department manual, *Federal Prosecution of Election Offenses*, is misdirected. In fact, that evolution reflects cautious consideration, guided by accumulated experience and relevant legal developments, of how prosecutorial discretion might best be exercised in attacking criminal conduct in election campaigns.

for offenses involving $25,000 or more in any calendar year and two years' imprisonment for offenses involving more than $10,000 and less than $25,000).[5]

Nor does either statute cover "the whole situation" of the other. In order to prove a violation of Section 1001 (or of Sections 1001 and 2), the government has to prove that a false statement was made—a fact not necessary for proof of a criminal FECA violation under 2 U.S.C. 437g(d), which may simply involve the making of an illegal contribution. And Section 1001 applies to false statements within the jurisdiction of any federal agency, not merely statements made to the FEC. In order to prove a violation of FECA's criminal prohibitions, by contrast, the government must prove a violation of a provision of the FECA, which of course is not necessary in a prosecution under Section 1001. Each statute thus prohibits substantial conduct that is not prohibited by the other.

Petitioner argues (Pet. 23-25) that Congress intended in enacting FECA to regulate all aspects of campaign finances, and that Congress therefore did not intend that campaign reporting violations would be prosecuted under the false statements statute. But the general rule disfavoring implied repeals has been applied even in situations where Congress has enacted subsequent

---

[5] Petitioner's emphasis on the misdemeanor penalty that was authorized under FECA (see Pet. 8, 24, 27) is misplaced in light of the new amendments. As noted in the text, FECA now authorizes a felony prosecution for a violation of its conduit contribution ban and, in the case of conduit contributions involving $25,000 or more, the maximum penalty for that felony is the same five years' imprisonment provided for under the false statements statute, 18 U.S.C. 1001. The convergence of the penalties under FECA and under Section 1001 further reduces the practical importance of the issue petitioner seeks to present.

legislation that may be characterized as "comprehensive" and has also established an administrative agency with regulatory jurisdiction in the area. In *Edwards* v. *United States*, 312 U.S. 473, 484 (1941), the Court summarily rejected an argument that the Securities Act of 1933 repealed the provisions of the mail fraud statute insofar as they covered securities, noting that "[t]he two can exist and be useful, side by side." Similarly, the Court in *United States* v. *Noveck*, 273 U.S. 202, 205 (1927), rejected an argument that a statute prohibiting anyone from "willfully attempt[ing] in any manner to defeat or evade" an income tax impliedly repealed the general perjury statute, insofar as that statute applied to perjurious statements on a tax return. The Court noted that there "was confessedly no express repeal" and that "it is clear that the two sections are not inconsistent." *Id.* at 206. Because the two offenses "are entirely distinct in point of law, even when they arise out of the same transaction or act," the Court found that the conclusion that "Congress must have intended" an implied repeal "does not follow." *Ibid.* See, *e.g.*, *United States* v. *Moore*, 423 U.S. 122, 138 (1975) (prosecution for drug distribution rather than for violation of registration provisions); *United States* v. *Tomeny*, 144 F.3d 749 (11th Cir. 1998) (misdemeanor false statement provision of the Magnuson-Stevens Fishery Conservation and Management Act did not preempt felony prosecution under 18 U.S.C. 1001); *United States* *Mitchell*, 39 F.3d 465, 471- 476 (4th Cir. 1994) (provision of misdemeanors for violation of Endangered Species Act of 1973 and Department of Agriculture regulations do not preclude

felony prosecution for violation of those regulations under 18 U.S.C. 545), cert. denied, 515 U.S. 1142 (1995).[6]

The cases relied on by petitioner (Pet. 22-23) for the proposition that "broad, general criminal statutes do not apply to an area specifically and comprehensively regulated by a targeted statute[ ],"[7] are inapposite. In each of those cases, the court declined to find that the challenged conduct was covered by a "broad, general criminal statute," because the language of that statute did not "plainly and unmistakably" cover the conduct,

---

[6] See *United States* v. *Parsons*, 967 F.2d 452, 456 (10th Cir. 1992) (false statements to Internal Revenue Service may be prosecuted under either Section 1001 or the specific provisions of the Internal Revenue Code); *United States* v. *Bilzerian*, 926 F.2d 1285, 1299-1304 (2d Cir.) (antifraud provisions of Securities Exchange Act of 1934 do not preclude prosecution under 18 U.S.C. 1001), cert. denied, 502 U.S. 813 (1991); *United States* v. *Jackson*, 805 F.2d 457, 459-464 (2d Cir. 1986) (misdemeanor provisions of 18 U.S.C. 510 do not preclude felony prosecution under general conversion statute, 18 U.S.C. 641), cert. denied, 480 U.S. 922 (1987); *United States* v. *Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1985) (civil enforcement provisions of Ethics in Government Act of 1978 did not repeal application of Section 1001 to false statements made in reports filed pursuant to its disclosure provisions), cert. denied, 475 U.S. 1045 (1986); *United States* v. *Brien*, 617 F.2d 299, 309-311 (1st Cir.) (antifraud provisions of the Commodity Futures Trading Commission Act of 1974 did not preempt or implicitly repeal the general mail and wire fraud statutes), cert. denied, 446 U.S. 919 (1980).

[7] See *Dowling* v. *United States*, 473 U.S. 207 (1985); *United States* v. *Enmons*, 410 U.S. 396 (1973); *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 412 (1972); *United States* v. *Johnson*, 390 U.S. 563, 564-566 (1968); *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 194 (1967); *NLRB* v. *Drivers Local Union*, 362 U.S. 274, 291-292 (1960); *United States* v. *Boffa*, 688 F.2d 919, 928-929 (3d Cir. 1982); *United States* v. *DeLaurentis*, 491 F.2d 208, 214 (2d Cir. 1974).

Dowling v. *United States*, 473 U.S. 207, 228 (1985), whereas another, narrower statute squarely targeted such conduct. Unlike the situation in those cases, where there was "ambiguity concerning the ambit" of the broader statute, *id.* at 229, there is no question that the false statements statute covers the false reports involved in this case.

The two other courts of appeals that have considered the precise issue presented here have rejected the contention that campaign reporting violations may be prosecuted only under the misdemeanor provisions of FECA. See *United States* v. *Hopkins*, 916 F.2d at 218 (finding "no indication in the federal election laws that Congress intended them to supplant the general criminal statutes found in Title 18"); *United States* v. *Curran*, 20 F.3d at 566 (noting that "an examination of the legislative history of the Election Campaign Act and its amendments uncovers no express evidence that the Act was intended to preempt the general criminal provisions under 18 U.S.C. §§ 2(b), 371, or 1001").

Petitioner argues (Pet. 26) that the false statement statute cannot be applied to her conduct, which she characterizes as expression protected by the First Amendment, because it "cannot survive strict, or even close, scrutiny." Petitioner argues that "[t]here is no compelling governmental interest" that could justify prosecuting conduit contributions as false statements under Section 1001, rather than as violations of the FECA. *Ibid.* Petitioner, however, was not charged with soliciting political contributions, which is activity protected by the First Amendment. Rather, she was charged with using conduits to disguise the source of political contributions and thereby causing false representations on a matter within the jurisdiction of the FEC. Such conduct is not immunized by the First

Amendment. See, *e.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); see also *United States* v. *Barker*, 930 F.2d 1408, 1412 9th Cir. (1991) ("There is simply no constitutional right to file a false claim."); *United States* v. *Daly*, 756 F.2d 1076, 1081 (5th Cir.), cert. denied, 474 U.S. 1022 (1985); *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982), cert. denied, 459 U.S. 1227-1228 (1983). Moreover, although petitioner argues (Pet. 29) that the court of appeals' decision would "chill" active participation in political campaigns, ample protection for legitimate contributors is provided by the uniformly recognized requirement that a defendant cannot be held liable for making (or causing) a false statement under Section 1001 unless the government can prove beyond a reasonable doubt that the defendant had actual knowledge of the statement's falsity. Cf. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280 (1964) (libel against public official relating to official conduct requires proof of "knowledge that [statement] was false or * * * reckless disregard of whether it was false or not").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

ELIZABETH D. COLLERY
Attorney

JULY 2002